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In the Supreme Court of the United States

OCTOBER TERM, 1934

UNITED STATES OF AMERICA, PETITIONER

v.

ATLANTIC MUTUAL INSURANCE COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

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The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Court of Claims in the above case.

OPINION BELOW

The opinion of the Court of Claims is reported in 1934 A. M. C. 1563.

JURISDICTION

The judgment of the Court of Claims was entered November 5, 1934. Motion for a new trial was overruled January 14, 1935. The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether general average doctrines apply to the operation of an Army transport carrying military supplies and personnel, and cargoes belonging to the American Red Cross, the Government of the Philippine Islands and its national railway, so as to obligate the United States to contribute in general average.

2. Whether, if the United States is obligated, the cause of action upon which contribution is claimed first accrued upon delivery of the cargo at destination or upon the conclusion of a statement prepared by general average adjusters.

3. Whether an underwriter who has paid the Philippine Government and its national railway for the full physical damage caused to their cargo may recover more than the amount paid to its assured, on the ground that the United States is liable for the contributions of all cargo owners from whom bonds were not required upon release of the respective cargoes.

4. Whether, in computing the general average contribution of the United States, interest should be added to the amounts which the other parties are to receive.

STATUTES INVOLVED

Section 156 of the Judicial Code, as amended (28 U. S. C., Sec. 262):

> 'Every claim against the United States cognizable by the Court of Claims, shall be forever barred unless the petition setting

> forth a statement thereof is filed in the court * * * within six years after the claim first accrues. * * *

Section 177 of the Judicial Code, as amended (28 U. S. C., Sec. 284):

> No interest shall be allowed on any claim up to the time of the rendition of judgment by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest * * *.

STATEMENT

The findings of fact by the Court of Claims may be summarized as follows:

The Army transport *Logan*, which was used primarily in the carrying of military supplies and personnel with authorized allowances of baggage, sailed on December 5, 1918, for Vladivostok, Siberia, and the Philippine Islands. In addition to military supplies, personnel, and baggage, the *Logan* carried on this voyage Red Cross supplies and property of the Government of the Philippine Islands and the Manila Railroad Company, all of whose capital stock is owned by the Philippine Government. This property was carried subject to a notice posted on the bulletin board in the quartermaster's station at the dock in San Francisco, from which the *Logan* sailed, that the United States would use due care in handling goods on the transport but would not be responsible for them. The supplies and cargo were carried free of charge and no bills of lading were issued.

During the voyage fire was discovered in one of the holds, and in extinguishing it a substantial portion of cargo was damaged by water and steam, and some of it was thrown overboard. The fire, as was later found, was caused by spontaneous combustion and was due to the negligence of no one. On January 4, 1919, the *Logan* arrived at Vladivostok and discharged part of the cargo; on January 19 the remainder of the cargo was discharged at Manila. The master of the transport delivered the cargo without obtaining from the Philippine Government or its national railway, or from the Red Cross, general average bonds.

In April, 1921, the Atlantic Mutual Insurance Company, which had insured the cargoes of the Government of the Philippine Islands and its national railway, completed payment to its assured of the sum of $38,997.02, the full physical damage sustained by their cargo and the full amount claimed by them. On March 15, 1921, the insurance company made claim upon the War Department for general average contribution. A board of inquiry in the War Department denied the claim, but later the Judge Advocate General reversed the decision and held that general average was properly payable. On August 22, 1922, Johnson and Higgins, average adjusters, were employed by the War Department to prepare a general average statement, which was completed and issued on December 31, 1926. It stated that the Government of the Philippine Islands and its railway

were to contribute $8,909.08 and to receive $38,-132.76, plus interest on the same, $18,875.72, leaving a balance to be received of $48,099.40.

On February 18, 1929, the insurance company brought the present action in the Court of Claims. The Government moved to dismiss on the ground that the action was brought more than six years from the date when the cause of action first accrued. The Court of Claims overruled the motion and held that the insurance company was entitled to recover $48,099.40 from the United States.

SPECIFICATION OF ERRORS TO BE URGED

The Court of Claims erred:

1. In failing to dismiss the petition upon limitation grounds.

2. In holding that general average principles apply to voyages of army transports "used primarily for the carrying of Government supplies and the United States Army personnel, and their authorized allowances of baggage."

3. In holding that the underwriter could recover in excess of the amount paid its assured.

4. In allowing as a proper item of consideration in the adjustment interest on the sums to be received.

REASONS FOR GRANTING THE WRIT

1. The question whether the United States as owner of an Army transport is liable to contribute in general average has not been passed upon by

this Court. In *Johnson & Higgins* v. *United States,* 287 U. S. 459, it was said (p. 462) that "The question of that liability could not be regarded as free from doubt." In that case, which arose out of the same events as the case at bar, the Court of Claims had resolved the doubt in favor of the United States, holding that the Quartermaster Corps had no authority to engage general average adjusters to determine the amount of a contribution for which the United States was not liable. This Court found it unnecessary, as the Solicitor General agreed, to decide the question of the liability of the United States for general average contribution, holding that the adjusters could recover compensation irrespective of the legal liability of the United States to contribute in general average.

In the case at bar the Court of Claims decided in favor of the general average claimant, overruling *sub silientio* its decision in the previous case. In so doing the court appears to have misapplied the rule announced in *The Davis,* 10 Wall. 15, that the United States is liable for general average contribution as owner of a cargo shipped on a commercial vessel. Where the vessel is owned by the United States and is engaged primarily in carrying military supplies and military personnel of the United States, and is also carrying property of an insular possession, the elements of joint commercial venture which underlie the doctrine of general average appear not to exist. Compare *The West-*

ern Maid, 257 U. S. 419, 431–432; *The Fidelity,* 8 Fed. Cas. No. 4758; 1 Magens on Insurance, p. 63.

2. In holding that the suit was seasonably brought, because the cause of action did not accrue until the conclusion of a statement by average adjusters, the decision below is in conflict with that of the Circuit Court of Appeals for the Second Circuit in *Det Forenede Dampskibs Selskab* v. *Insurance Company of North America,* 31 F. (2d) 658. The precise question in that case was the date as of which extraordinary expenses made in foreign currency by a shipowner were to be converted into dollars for the purpose of determining general average contributions. The Circuit Court of Appeals held that the result depended upon the date as of which the cause of action for general average accrued. Judge Learned Hand, speaking for the court, said with reference to the accrual of the cause of action (pp. 659–660):

> the question is whether a liquidation of the contribution by a general average settlement is a condition upon the shipowner's suit. * * *
>
> We hold that suit may be brought upon the implied obligation at the termination of the venture and acceptance of the goods, and that the amount may be liquidated in the action or suit. * * *

Judge Hand relied in part upon the case of *Du-pont de Nemours & Co.* v. *Vance,* 19 How. 162, where a suit was allowed for general average contribution "although there was no pretense of any

preceding settlement" (p. 659). He disapproved the *dicta* in *The Allianca,* 64 Fed. 871, affirmed by the Circuit Court of Appeals for the Second Circuit in 79 Fed. 989, upon which the Court of Claims in the case at bar principally relied.[1]

3. The amount of the liability of the United States, assuming that there is responsibility in general average, appears to have been determined by an erroneous application of general average principles. Judgment was allowed in the amount of $48,099.40. Of this sum $18,875.72 is properly to be regarded as interest upon the sum otherwise due. Congdon on General Average (2d ed.), p. 165. Such allowance of interest is unauthorized in the Court of Claims. *Tillson* v. *United States,* 100 U. S. 43. The sum of $5,913.71 was included in the liability as representing the contribution of the other parties to the general average. This additional liability was imposed upon the United States because of the failure of the master of the transport to require bonds of the respective cargo owners. The application of this principle of general average to the circumstances of the case at bar presupposes that the United States is obliged to exact bonds from the American Red Cross, the Philippine Gov-

[1] The other cases cited by the court below on this question do not deal with the time as of which the right to recover general average contribution accrues. These cases are: *Leggett & Co.* v. *500 Cases of Tomatoes,* 15 F. (2d) 270; *The Emilia S. de Perez,* 22 F. (2d) 585; *The Ernestina,* 259 Fed. 772, and *The Santa Ana,* 154 Fed. 800.

ernment and its national railway upon the surrender to them of their property carried on an Army transport. This assumption is not discussed in the opinion below.

Even if the insured, which made no claim for general average contribution, could have availed itself of the additional contribution because of the master's failure to require bonds, the further question is raised whether the underwriter may recover, in an action in its own name, more than it has paid to its insured.

4. This case presents questions of importance to the United States and underwriters alike, which have not been passed upon by this Court. The decision below is in conflict with a decision of the Circuit Court of Appeals for the Second Circuit. In several respects it rests upon an apparently erroneous application of the principles of general average to a military vessel of the United States engaged in governmental service.

Wherefore, it is respectfully submitted that this petition should be granted.

STANLEY REED,
Solicitor General.

APRIL 1935.

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